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MICHAEL RODAK, JR., CLER

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 80-202

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In the absence of a workable test for classifying credit card transactions as being either primarily for business purposes or primarily for personal use, should a credit card issuer be required to abide by the provisions of the 1974 Fair Credit Billing Act, 15 U.S.C. § 1666, before revoking the credit card of an individual who has signed as jointly and severally liable for the debts incurred thereon, regardless of the purpose of use of the card.

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Respondent, Louis R. Koerner, Sr., respectfully submits this response to the petition for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered April 7, 1980, and further respectfully prays that said writ be denied.

STATEMENT OF THE CASE

Respondent, Louis R. Koerner, Sr., filed suit in November of 1976 against Petitioner, the American Express Company, alleging that

Petitioner violated the provisions of 15 U.S.C. § 1666 in that it wrongfully revoked Respondent's credit card as a result of a billing dispute. Petitioner filed a Motion for Summary Judgment, contending that the statute, 15 U.S.C. § 1666, does not apply to transactions of a business or commercial nature pursuant to 15 U.S.C. § 1603. The United States Magistrate rendered his initial report, recommending that the Motion be granted. The District Court, the Hon. Edward J. Boyle, Sr., affirmed the decision [444 F.Supp. 334], and in so doing dismissed other pendent state claims which were dependent upon federal jurisdiction under 15 U.S.C. § 1666.

Respondent filed a Motion for New Hearing and to Alter or Amend Judgment and/or for a New Trial, which motion was denied by District Judge Boyle on January 4, 1978.

On appeal, the Fifth Circuit Court of Appeals, Wisdom, J., reversed and remanded the case, 615 F.2d 191 (5th Cir. April 7, 1980), holding that the provisions of the Truth in Lending Act dealing with the correction of billing errors and requiring that a credit card issuer take certain steps before restricting or closing a credit card account were applicable to an individual cardholder who was jointly and severally liable with his

employer for debts charged to the card.

This holding is limited to an interpretation of one section of the 1974 amendments to the Truth in Lending Act, 15 U.S.C. § 1666, and does not in any way threaten to disrupt the business credit transaction exemption that governs the broad range of commercial practices to which Petitioner refers. Business credit transactions are the subject of the original 1968 Truth in Lending Act, and nothing in the Fifth Circuit decision in the present case nullifies the effect of the 15 U.S.C. § 1603 business and commercial exemption as it pertains to those transactions.

The facts which gave rise to the instant litigation are as follows. On November 16, 1965, the corporation, John E. Koerner & Company, Inc., made an application for a company account American Express card. The application was approved, and the account was opened. Also on November 16, 1965, Louis R. Koerner, Sr., Respondent herein, a company officer, completed a form labeled "Application for Supplementary Credit Card, Company Account." This application was approved, and the card was issued. Respondent signed a statement joining the application and assuming joint and several liability for any debts. Respondent used the card both for business and

personal purposes and, although all charges were billed to the company, Respondent remitted payment to American Express for a number of transactions with personal checks drawn on his own account. In 1975, a billing dispute arose over the following charges included on the combined billing statements sent to the company:

(a) Three debits in the amount of $3.00 each and one debit in the amount of either $3.00 or $6.00 for charges made by Respondent in July, August, September and October of 1975 for air flight insurance for trips conducted for business purposes.

(b) A debit of $20.00 representing, according to Respondent, "a charge for Mr. John E. Koerner's card which was returned and for which credit was never given." This was a renewal fee for a card no longer desired.

(c) A debit of $20.00, ultimately cancelled by a credit which Respondent asserted was "a charge for a card of Ralph E. Koerner." The nature of the charge has not been established.

The dispute remained unresolved through September 28, 1976. On that date and when he attempted to use his card for the purchase of an airline ticket at the New Orleans International Airport, Respondent was asked to speak by phone to a representative of American Express. Following the conversation with the

representative, Respondent was presented with his credit card cut in two. The purpose of the trip for which the ticket was to be purchased was business related.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THE RELEVANT PRIOR JUDICIAL INTERPRETATIONS OF THE CREDIT CARD PROVISIONS OF THE TRUTH IN LENDING ACT

Petitioner claims that the Fifth Circuit Court of Appeals decided that the Truth in Lending Act applies to every extention of credit for which an individual may be liable and that the decision ignores the exemption for business and commercial transactions provided by 15 U.S.C. § 1603.

The decision of the Court of Appeals is not, however, as broad as Petitioner contends. The scope of the case is strictly limited to an interpretation of one section of the 1974 amendments to the Truth in Lending Act, specifically 15 U.S.C. § 1666, the amendment dealing with the settlement of billing disputes in credit card transactions. The decision does not affect the exemption for business and commercial transactions provided for in 15 U.S.C. § 1603.

Although the Court of Appeals did not decide whether the business exemption should

be applied to the 1974 amendments dealing with credit cards, both judicial and administrative interpretations, as well as the legislative history, of these amendments lead to the conclusion that the exemption for business and commercial transactions allowed under 15 U.S.C. § 1603 should not apply to the 1974 amendments.

When Congress enacted the Truth in Lending Act in 1968, the original Act contained no provisions regarding credit card transactions, but was intended to provide "a meaningful disclosure of credit terms" to consumers. 15 U.S.C. § 1601. As the Act was a piece of consumer protection legislation focused on consumer credit transactions, exemptions were allowed for corporate debtors and individuals who secure credit for business or commercial purposes. These debtors were thought to be amply sophisticated to make informed judgments as to the value of alternative credit plans and to be able to negotiate beneficial credit terms, so as not to require the special disclosure protections provided by the Act. Hence, 15 U.S.C. § 1603 exempted "credit transactions involving extentions of credit for business or commercial purposes or . . . to organizations [defined to include corporations and partnerships]."

The business or commercial purpose exemptions remain in full force with regard to the provisions of the 1968 Truth in Lending Act itself, and it is not these exemptions which are at issue in the present case. Accordingly, the cases cited by the Petitioner are inapposite to the issue presented in the case at bar.

Petitioner cites cases dealing with extentions of credit which are, without dispute, contemplated by the 1968 Act, such as commercial loans, Poe v. First National Bank of DeKalb County, 597 F.2d 895 (5th Cir. 1979), Weingarten v. First Mortgage Co., 466 F.Supp. 349 (E.D. Pa. 1979); mortgages for the acquisition or improvement of commercial property, Adema v. Great N. Dev. Co., 374 F.Supp. 318 (N.D. Ga. 1973), Puckett v. Georgia Homes, Inc., 369 F.Supp. 614 (D.S.C. 1974), Sapenter v. Dreyco, Inc., 326 F.Supp. 871 (E.D. La.), aff'd, 450 F.2d 941 (5th Cir. 1971), cert. denied, 406 U.S. 920 (1972), Tower v. Home Const. Co. of Mobile, Inc., 458 F.Supp. 112 (S.D. Ala. 1978); and loans for the purchase of personal automobiles, Gallegos v. Stokes, 593 F.2d 372 (10th Cir. 1979), Smith v. Chapman, 436 F.Supp. 58 (W.D. Tex. 1977), aff'd, 614 F.2d 968 (5th Cir. 1980), Vines v. Hodges, 422 F.Supp. 1292 (D.D.C. 1976).

These credit transactions are easily classified as transactions for business or commercial purposes, or as transactions for "personal, family, household, or agricultural purposes," and, as part of the 1968 Act, are exempted by 15 U.S.C. § 1603 when classified as the former.

The 1970 and 1974 amendments to the Truth in Lending Act, which deal with credit card transactions, present a much more problematic situation when an attempt is made to reconcile them with the business and commercial exemptions of 15 U.S.C. § 1603. Judicial and administrative interpretations of the 1970 amendments, which sought to prevent the issuance of unsolicited credit cards, 15 U.S.C. § 1642, to limit to $50.00 the liability for the unauthorized use of a credit card, 15 U.S.C. § 1643, and to provide criminal sanctions for the fraudulent use of a credit card, 15 U.S.C. § 1644, concluded that the business and commercial exemptions provided by 15 U.S.C. § 1603 were inappliciable to the amendments. See, American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196 (2d Cir. 1974), Federal Reserve Board regulation 12 C.F.R. 226.13(a)(4), (1973)(amended Nov. 2, 1972) now codified at 226.2(m), and a Federal Trade Commission decision, In re Credit Card Service

Corp. d/b/a Credit Card Service Bureau, 82 F.T.C. 191, 209-11 (1973), affirmed and enforced sub nom. Credit Card Service Corp. v. Federal Trade Commission, 495 F.2d 1004 (D.C. Cir. 1974). These interpretations by Courts of Appeals, as well as by the Federal Reserve Board and the Federal Trade Commission, construed the credit card amendments to the Truth in Lending Act as applicable to all credit cardholders, including corporations.

The conflict between the business exemptions of 15 U.S.C. § 1603 and the 1970 credit card amendments arises for two reasons. First, unlike other forms of credit transactions in which the potential corporate debtor, being in a better bargaining position than its consumer counterpart, may negotiate better credit terms, there is no distinction between the corporate and the consumer credit cardholder when faced with a standardized credit card application form. The use of form contracts for credit card applications, the Remis Court stated, makes the process "a take-it-or-leave-it method of contract formulation." 494 F.2d at 202. Secondly, there is no viable way of distinguishing between credit cards issued for "business purposes" and those issued for "personal use," since a credit card is often used for both personal and business trans-

actions. The Courts have uniformly held that any "purpose of use" or "predominant use" test for classifying a particular credit card as either business or personal is unwieldy and totally unworkable. The Courts have thus held that the amendments to the Truth in Lending Act which deal with credit card transactions were intended to apply to all credit card transactions, including business and commercial transactions.

The Fifth Circuit Court of Appeals, while acknowledging the validity of the prior judicial and administrative interpretations of the credit card provisions of the Truth in Lending Act, declined to resolve the question of whether 15 U.S.C. § 1666 covers corporate transactions and transactions for business or commercial purposes, but rather based its decision on a much narrower ground. The Court found that Respondent was a consumer within the meaning of the specific provision, since he had signed a statement joining in the application and assuming joint and several liability for any debts incurred on the card. Since Petitioner could recover from either Respondent or from the company, the Court held that it must abide by the requirements of 15 U.S.C. § 1666 for correction of billing errors in a consumer's credit card statement.

The Court recognized that its decision prevented application of the business exemption of 15 U.S.C. § 1603 to 15 U.S.C. § 1666 when an individual is liable for the debts incurred, but stated that this result is in consonance with the purpose of the Fair Credit Billing Act of 1974, i.e., the 1974 amendments to the Truth in Lending Act, of which 15 U.S.C. § 1666 is a part -- protecting consumers from the harrassment of creditors. See S.Rep. No. 278, 93d Cong., 1st Sess. 1-2, 4-6 (1973); S.Rep.No. 750, 92d Cong., 2d Sess. 1-4 (1972).

While the Court may not have wished to resolve the issue of whether corporate transactions and transactions for business or commercial purposes are protected by the 1974 amendments dealing with credit cards, its decision protecting individuals who may be liable for debts incurred on their credit cards was the only possible solution in light of the difficulty of classifying credit cards as to their "predominant use." It is the individual consumer who is subjected to the harrassment and embarrassment which the amendments are designed to prevent.

The only workable method of protecting the individual from such harrassment, in the absence of any viable test for classifying

credit cards, is to apply the protections of 15 U.S.C. § 1666 to any individual who is personally liable for the debts incurred on the card. This rule of decision sets up a simple and straightforward test which is non-technical and easily understandable, and which can be applied in all situations by the issuer and the cardholder with a minimum of difficulty.

It would seem as Petitioner should welcome such a test, as it eliminates the prospective uncertainty on the part of the credit card issuer as whether or not to comply in a particular case with 15 U.S.C. § 1666. The predominant use test invites violation, since the facts of predominant use by the cardholder would not ordinarily be within the knowledge of the issuer. The test established by the Court of Appeals provides a procedure for ascertaining in advance the necessity of compliance, a test which can be utilized prior to the initial extension of credit, and which therefore reduces or eliminates the risk of an inadvertent violation.

In the facts of the case at bar, there was never any prior notification to Respondent from the Petitioner that the billing error was the cause of any problem, nor that Petitioner was even considering the revocation of the

card. The card was revoked unilaterally, without notice, without an opportunity to explain, and without opportunity to contest. The unfairness and the embarrassment were maximized. Surely this is exactly the type of action which the provisions of 15 U.S.C. § 1666 were intended to correct.

In sum, the decision of the Fifth Circuit Court of Appeals in the instant case is a well-considered, easily understandable, easily applicable test for the protection of individuals who, like Respondent, are liable for the debts incurred on their credit cards. The scope of the decision is limited solely to the provisions of 15 U.S.C. § 1666 and is not in conflict with the long-standing business exemption to the credit transactions of the 1968 Truth in Lending Act. For that reason, certiorari should be denied.

II. WHERE ADMINISTRATIVE INTERPRETATIONS ARE AT VARIANCE WITH ONE ANOTHER, A COURT MUST WEIGH THE OPINIONS IN ARRIVING AT ITS DECISION

Petitioner contends that the Court of Appeals violated the recent holding of this Court in Ford Motor Credit Company v. Milhollin, ____ U.S. ____, 100 S.Ct. 790 (1980), by disregarding the Federal Reserve Board staff opinion which stated that the Truth in Lending

Act would not apply in a case such as the one at bar. The Fifth Circuit recognized that the interpretive letter should be given great weight, in light of the Milhollin decision. However, the letter is in conflict with the language of the statute, as well as with Federal Reserve Board regulations.

The Court explained that, regarding the language of the statute itself, although the term "cardholder" is not used in 15 U.S.C. § 1666, it is used in 15 U.S.C. § 1666f, h & j, companion sections to 15 U.S.C. § 1666. Use of the term "cardholder" would suggest that the provisions were applicable to all cardholders, regardless of the purpose for which the card was used. Secondly, the Federal Reserve Board uses "customer" rather than "obligor" throughout its regulations explaining 15 U.S.C. § 1666. One definition of "customer," stated the Court, is "cardholder." 15 C.F.R. 226.2(u). The Court determined that the regulations deserved as great a weight as the interpretive letter. In light of the practical difficulties in formulating a test for classifying a particular credit card as either for business or personal use, the Court weighed the conflicting interpretations in favor of protecting all individuals who may be liable for the debts incurred on their credit

cards, regardless of the purpose of use.

III. THE IMPACT ON CREDIT FOR BUSINESS ENTERPRISES WILL BE, AT MOST, MINIMAL AS A RESULT OF THE COURT OF APPEALS' DECISION

Finally, Petitioner claims that the decision of the Court of Appeals will have a significant impact on credit for business enterprises. This is simply not the case. As indicated above, the holding of the Fifth Circuit is a very narrow one, limited only to the 1974 amendment to the Truth in Lending Act. Thus, the effect on the majority of commercial credit transactions, such as loans to corporations, is non-existent, regardless of the practice of many lending institutions to require individual liability as security. These forms of credit transactions, easily classified as business or commercial in nature, remain untouched by the holding in the case at bar and are still exempted by 15 U.S.C. § 1603.

The sole credit transaction affected by the decision of the Court of Appeals is the credit card transaction in which an individual cardholder is signed as liable for the debts incurred on the card. Henceforth it will be necessary for the credit card issuer to abide by the requirements of 15 U.S.C. § 1666 in correcting billing errors or settling billing

disputes. The mechanisms for complying with the provisions of 15 U.S.C. § 1666 are already established for the millions of cardholders who have been issued their cards in their own names.

The additional "burden" of providing notice of a problem, of providing an opportunity to explain billing and payment discrepancies, and of providing an opportunity to contest the revocation of a credit card, will be, at most, minimal. Complying with these provisions will mean that credit card issuers will merely have to take the time to enclose some form of notice with the monthly bill and will have to listen to the explanation of a cardholder who has a discrepancy in his account statement. Certainly, such compliance is consonant with the purpose of the amendment -- to prevent the harrassment of consumers by creditors.

The alternative to such a holding would require a test for determining the classification of credit cards according to their use. Such tests have been shown to be unwieldy and unworkable. In addition, a test such as the "prospective predominant use" test developed by the District Court in the instant case, would be easily evaded.

Large corporations with many traveling employees would merely have these individual

employees acquire credit cards in their own names, then make contractual arrangements to reimburse employees for all business uses of the card (i.e. expense account reimubrsement). In this manner all uses of the card would be brought within the coverage of the Truth in Lending Act, even though the predominant use of the card was for business purposes. Conversely, the small businessman with no, or few, employees, who might acquire a credit card in his company name for reasons of convenience and economy, would not be protected by the provisions of the Truth in Lending Act, even though it is possible that the predominant use of the card would be for personal purposes.

To allow such an unworkable test to govern the application of the 1974 Truth in Lending Act provisions on credit card transactions would be to frustrate the very purpose of the amendments. Accordingly, the only way to achieve the purpose of the 1974 amendments is to require credit card issuers to abide by the requirements of 15 U.S.C. § 1666 in all instances where the issuer is allowed to collect its debts from a consumer.

CONCLUSION

The decision for which Petitioner seeks review is narrow in scope. It does not limit

the applicability of the business or commercial transaction exemption to the broad range of ordinary commercial credit transactions, but merely attempts to achieve the purpose of the 1974 Fair Credit Billing Act -- to prevent the harrassment of consumers by creditors. In the absence of a workable test for classifying credit cards as to their primary use, the decision provides a simple and straightforward test that is non-technical and easily understandable, and which can be applied in all situations with a minimum of difficulty or risk to the issuer. For these reasons, Respondent respectfully prays that the petition for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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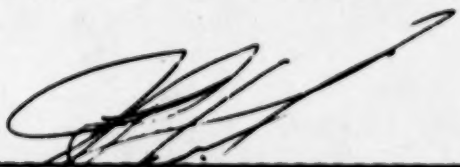

By: _____

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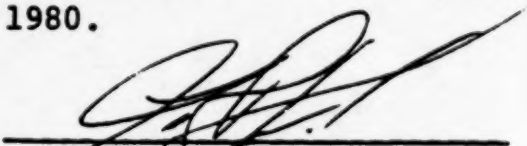
CERTIFICATE

I hereby certify that a copy of the foregoing pleading has been served upon all interested counsel by placing a copy of the same in the United States Mail, postage prepaid and properly addressed, all on this 5th day of November, 1980.



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